(1)

Supreme Court, U.S.
FILED

No. 001022 DEC 1 6 2000

In the Supreme Court of the United States

OCTOBER TERM, 2000

INTERACTIVE FLIGHT TECHNOLOGIES, INC.,
Appellants,

v.

SWISSAIR SWISS AIR TRANSPORT COMPANY, LTD., SR TECHNICS, LTD., AND SAIR GROUP,
Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARL A. SOLANO (*Counsel of Record*)
ROBERT B. BODZIN
JENNIFER J. NESTLE
NICOLE R. MOSHANG
Attorneys for Petitioner

SCHNADER HARRISON SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
Of Counsel.

36 pp

QUESTION PRESENTED

Should the decision of the Court of Appeals for the Ninth Circuit, which held that it lacked jurisdiction to review a dismissal of an action for purposes of arbitration, be reversed and remanded for reconsideration in light of this Court's decision in *Green Tree Financial Corp.- Alabama v. Randolph*, 531 U.S. ___, 69 U.S.L.W. 4023 (Dec.11, 2000; No. 99-1235)?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are named in the caption. Global Technologies, Ltd., a publicly traded company, is the successor by merger of petitioner Interactive Flight Technologies, Inc. There are no publicly traded corporations that hold 10% or more of Global Technologies, Ltd.'s stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT AND ORDERING SUMMARY REVERSAL 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases *Page*

Cook v. Erbey, 207 F.3d 1104 (9th Cir. 2000) 7

Green Tree Financial Corp.– Alabama v. Randolph, 531 U.S. ___, 69 U.S.L.W. 4023 (Dec.11, 2000; No. 99-1235) ..... *passim*

McCarthy v. Providential Corp., 122 F.3d 1242 (9th Cir. 1997) 7

Napleton v. General Motors Corp., 138 F.3d 1209 (7th Cir. 1998) 7

Seacoast Motors of Salisbury, Inc. v. Chrysler Corp., 143 F.3d 626 (1st Cir. 1998) 7

Statutes and Court Rules

Federal Arbitration Act

Section 4, 9 U.S.C. § 4 6

Section 16, 9 U.S.C. § 16 ..... 2-3, 6

Judicial Code

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332 5

Federal Rules of Civil Procedure

Rule 59 ..... 2, 6

In the Supreme Court of the United States

OCTOBER TERM, 2000
NO.

INTERACTIVE FLIGHT TECHNOLOGIES, INC.,
Appellants,

v.

SWISSAIR SWISS AIR TRANSPORT COMPANY, LTD., SR TECHNICS, LTD., AND SAIR GROUP,
Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

On March 31, 2000, the United Stated District Court for the District of Arizona dismissed plaintiff's action against defendants because it believed that the dispute was subject to an agreement requiring its arbitration before the Zurich Chamber of Commerce in Switzerland. On September 18, 2000, the United States Court of Appeals for the Ninth Circuit dismissed plaintiffs' appeal from that order on the ground that a dismissal for purposes of arbitration is not a final appealable order. This Court has now confirmed that the Ninth Circuit's view of its jurisdiction to review a decision like this one is in error. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. ___, 69 U.S.L.W. 4023 (Dec.11, 2000; No. 99-1235). Accordingly, the Court should reverse the Court of Appeal's decision and remand it for reconsideration in light of the Court's holding in *Green Tree*.

OPINIONS BELOW

The order of the Court of Appeals for the Ninth Circuit is unreported and appears in the Appendix at page A1. The district court's order dismissing this case is unreported and appears in the Appendix at pages A2-A14. The judgment of the district court appears in the Appendix at page A15. The order of the district court denying relief under Federal Rule 59 is unreported and appears in the Appendix at pages A17-A21.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered an order dismissing Petitioner's appeal on September 18, 2000. Petitioner did not file a petition for rehearing with the Ninth Circuit and such a petition is now time barred. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 16 of the Federal Arbitration Act, 9 U.S.C. § 16, provides:

> (a) An appeal may be taken from–
>
> (1) an order–
> (A) refusing a stay of any action under section 3 of this title,
> (B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,
(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title, or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

STATEMENT OF THE CASE

Plaintiff Interactive Flight Technologies, Inc. ("IFT") is a manufacturer of In-Flight Entertainment Systems ("IFEN Systems") for aircraft. The defendants are Swissair Swiss Air Transport Company, Ltd. ("Swissair"), which

owns and operates passenger aircraft; SR Technics, Ltd., which provides technical support and oversight for Swissair aircraft; and SAir Group, a holding company for Swissair, SR Technics, and other related entities.

IFT entered into a contract with Swissair to supply IFEN Systems for Swissair's aircraft. The contract contained a provision requiring arbitration of disputes before the Zurich Chamber of Commerce in Switzerland. In September 1996, SR Technics and Swissair entered into a contract for SR Technics to ensure that the IFEN Systems were properly installed by another company. IFT signed this contract and incurred an obligation to pay for SR Technics' services. This contract did not have an arbitration provision.[1]

In late 1997 and early 1998, IFT and Swissair entered into negotiations for IFT to equip additional aircraft with the IFEN Systems and to extend warranties on existing IFEN System installations. IFT made its proposals through letters sent to SR Technics. By letters and e-mail, Swissair accepted IFT's proposals to install the IFEN Systems on three additional aircraft and to extend warranties on existing installations. On October 8, 1998, IFT submitted a proposal to Swissair and SR Technics for installation of an IFEN System on a fourth additional Swissair aircraft. On October 9, 1998, Swissair accepted IFT's proposal for installation on the fourth aircraft. These new contracts did not have arbitration provisions.

---

1. The district court made a finding that the original contract between IFT and Swissair was superseded by a sales and warranty contract entered into on October 29, 1997. On November 3, 1997, IFT and SR Technics entered into a product services agreement that covered equipment already installed on Swissair aircraft and provided for maintenance by SR Technics of the IFEN Systems after installation. Both of these contracts had arbitration provisions.

On September 2, 1998, Swissair Flight 111 crashed in waters near Peggy's Cove, Nova Scotia. The aircraft had been equipped with one of IFT's IFEN Systems. Following an investigation, on October 29, 1988, Swissair decided to deactivate all IFEN Systems installed on Swissair aircraft. No conclusive evidence has shown that IFT's IFEN System was in any way responsible for the crash of Swissair Flight 111.

Swissair was IFT's only customer for the IFEN Systems. Following the unilateral decision by Swissair to disconnect the IFEN Systems, IFT had no contractual obligations to support the IFEN Systems because of the anticipatory breach by Swissair. At the time of the disconnection by Swissair, the defendants assured IFT that they would take all steps necessary to reactivate the IFEN System at the earliest possible date to minimize the harm to the business and reputation of IFT. After requests from Swissair for IFT to maintain its ability to support the IFEN System and assurances that Swissair would reactivate the IFEN Systems, IFT maintained significant staff, operations, and overhead to support the IFEN Systems. Nevertheless, despite defendants' assurances and despite the lack of any conclusive evidence that the IFEN System was in any way responsible for the Nova Scotia plane crash, defendants have failed and refused to reactivate the IFEN Systems.

IFT filed this action in federal district court for monies owed to it under contracts with the defendants and as a result of its reliance on promises by the defendants that caused it to incur substantial expenses.[2] IFT based its claims on the breach of the contracts that did not contain an arbitration clause, as well as promissory

---

2. The United States District Court for the District of Arizona had subject matter jurisdiction pursuant to 28 U.S.C. §1332(a) based on complete diversity of citizenship between the parties and an amount of controversy in excess of $100,000.

estoppel and breach of a duty of good faith and fair dealing.

On March 31, 2000, the district court entered an order dismissing without prejudice IFT's complaint because the claims raised by IFT were subject to the arbitration clauses in some of the contracts between IFT and Swissair. A2-A14. The district court treated the defendants' motions to dismiss as motions to compel arbitration under Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4. A4-A5. On April 3, 2000, the district court entered judgment. A15-A16. On May 31, 2000, the district court entered an order denying IFT's motion for relief under Rule 59 of the Federal Rules of Civil Procedure. A17-A21.

IFT filed a timely appeal of the district court's rulings to the Court of Appeals for the Ninth Circuit. On September 18, 2000, the Ninth Circuit granted the defendants' motion to dismiss the appeal for lack of jurisdiction, holding that Section 16 of the Federal Arbitration Act, 9 U.S.C. § 16, prohibits appeals from interlocutory orders of district courts finding in favor of arbitration. A1.

REASONS FOR GRANTING THE WRIT AND ORDERING SUMMARY REVERSAL

This Court should reverse and remand for reconsideration in light of this Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. ___, 69 U.S.L.W. 4023 (Dec.11, 2000; No. 99-1235). In *Green Tree*, this Court unanimously held that an order of dismissal directing that a dispute be resolved by arbitration constituted a final decision immediately appealable under Section 16(a)(3) because "the order plainly disposed of the entire case on the merits and left no part of it pending before the court." *Green Tree*, 69 U.S.L.W. at 4025.

The decision in *Green Tree* is directly contrary to the order of the Ninth Circuit below. In its order, the Ninth Circuit relied on its earlier decision in *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244-45 (9th Cir. 1997), which held that dismissals for purposes of arbitration are not appealable and relied on a distinction between "independent" and "embedded" proceedings.[3] This Court specifically noted the *McCarthy* decision in footnote 3 of its *Green Tree* opinion (69 U.S.L.W. at 4025) and made clear that *McCarthy* and similar decisions were contrary to its holding. In light of this Court's decision, the order below cannot stand.[4] Therefore, this Court should reverse the order of the Court of Appeals and remand for the Ninth Circuit to reconsider its decision in light of the change of law enunciated in *Green Tree*. In the alternative, this Court should summarily order that the Ninth Circuit has appellate jurisdiction to review the merits of IFT's appeal.

CONCLUSION

In light of *Green Tree*, the Court should grant the petition for a writ of certiorari to review the Court of

---

3. In its order, the Ninth Circuit also cited *Cook v. Erbey*, 207 F.3d 1104, 1106-07 (9th Cir. 2000), which also had relied on the decision in *McCarthy* that the determinative question was whether the motion to compel arbitration was "embedded" in the substantive case.

4. Although the dismissal in this case was without prejudice, while that in *Green Tree* was with prejudice, that distinction is of no consequence here. IFT is still out of court until the arbitration is completed. Among the decisions cited by this Court in *Green Tree* as contrary to its decision were two that dismissed the action without prejudice: *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, 143 F.3d 626 (1st Cir. 1998); and *Napleton v. General Motors Corp.*, 138 F.3d 1209 (7th Cir. 1998). *See Green Tree*, 69 U.S.L.W. at 4025 n.3. There is no reason to treat a dismissal without prejudice any differently than a dismissal with prejudice under Section 16(a)(3).

Appeal's dismissal of IFT's appeal from the dismissal of its case. In addition, the Court should summarily reverse the Court of Appeals' decision and remand it for reconsideration in light of the Court's decision in *Green Tree*. In the alternative, this Court should reverse the Court of Appeal's decision in light of *Green Tree* and remand with a direction that the Court of Appeals review the case on its merits.

Respectfully submitted,

Carl A. Solano
(*Counsel of Record*)
Robert B. Bodzin
Jennifer J. Nestle
Nicole R. Moshang
Attorneys for Petitioner

SCHNADER HARRISON SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
Of Counsel.

Dated: December 16, 2000.

APPENDIX

TABLE OF CONTENTS

Page

Order of the Court of Appeals (Sept. 18, 2000) A1

Order of District Court (March 31, 2000) A2

Judgment Entered by District Court (April 3, 2000) A15

District Court Order Denying Motion Under Rule 59 (May 31, 2000) A17

ORDER OF THE COURT OF APPEALS
(September 18, 2000)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERACTIVE FLIGHT TECHNOLOGIES, INC.,	:	No. 00-15933
Plaintiff-Appellant,	:	DC# CV-99-836-HRH Arizona (Phoenix)
v.	:	ORDER
SWISSAIR SWISS AIR TRANSPORT COMPANY, LTD; et al.,	:	
Defendants-Appellees.	:	

Before: WALLACE, BEEZER and FERNANDEZ, Circuit Judges

Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *See Cook v. Erbey*, 207 F.3d 1104, 1106-07 (9th Cir. 2000); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244-45 (9th Cir. 1997). The request for sanctions contained in appellees' motion is denied. *See* Fed. R. App. P. 38. This appeal is

DISMISSED.

ORDER OF THE DISTRICT COURT
(March 31, 2000)

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

INTERACTIVE FLIGHT TECHNOLOGIES, INC., Plaintiff, vs. SWISSAIR SWISS AIR TRANSPORT COMPANY, LTD., SR. TECHNICS, LTD., and SAIR GROUP, Defendants.	No. CV 99-0836-PHX (HRH)

ORDER

Motion to Dismiss

Defendants have filed motions to dismiss plaintiff's complaint.[1] These motions are opposed.[2] Oral argument was requested and has been heard.

1. Clerk's Docket Nos. 5 and 11.

2. Clerk's Docket No. 14.

FACTS

Plaintiff is Interactive Flight Technologies, Inc., which manufactures In-Flight Entertainment Systems (IFEN Systems). Defendants are Swissair Swiss Air Transport Company, Ltd., and SR Technics, Ltd. Plaintiff contracted with Swissair to supply IFEN Systems for Swissair's aircraft. Plaintiff contracted with Hollingsead to install the IFEN Systems. Because Swissair was not familiar with Hollingsead, as a condition precedent to entering into a contract with plaintiff, Swissair required that plaintiff fund Swissair's engagement of SR Technics to ensure that the IFEN Systems were properly installed. SR Technics and Swissair entered into a contract for this purpose in September of 1996. Plaintiff signed the September 1996 contract to acknowledge its obligation to pay SR Technics for SR Technics' services. Plaintiff and Swissair then entered into their original sales and services contract on October 22, 1996. This sales and services contract was superseded by a sales and warranty contract entered into on October 29, 1997. Plaintiff and SR Technics entered into a product support contract on November 3, 1997.

In late 1997 and early 1998, Swissair asked plaintiff for proposals to equip additional aircraft with IFEN Systems and to extend warranties on existing Swissair installations. Plaintiff made its proposals through a series of letters sent to SR Technics. By letter and e-mail, Swissair accepted plaintiff's proposals to install IFEN Systems on four additional aircraft and to extend warranties on the existing installations.

On September 2, 1998, Swissair Flight 111 crashed in the waters near Peggy's Cove, Nova Scotia. The aircraft involved was equipped with an IFEN System. Following the crash, investigations were conducted and continue to be conducted by Canadian and United States agencies into the cause of the crash. The investigation raised questions

as to whether the IFEN System played any part in the crash. In October of 1998, the investigating agencies and the parties attended a two-day meeting in Zurich. At the end of the meeting, Swissair decided to deactivate all IFEN Systems installed on Swissair aircraft. On November 13, 1998, the Swiss Federal Office of Civil Aviation demanded deactivation of the IFEN Systems on any aircraft operated under Swiss registration. Swissair has not reactivated the IFEN Systems on its aircraft.

Plaintiff filed the present suit raising three claims: (1) breach of the installation and extended warranty contracts; (2) promissory estoppel; and (3) breach of covenant of good faith and fair dealing. Defendants now move to dismiss plaintiff's complaint in its entirety.

DISCUSSION

Defendant Swissair

Swissair moves to dismiss plaintiff's complaint on the grounds that this court lacks subject matter jurisdiction because the contract in issue contains an express provision requiring the arbitration of all disputes in Zurich, Switzerland. Plaintiff argues that defendant should have moved to compel arbitration rather than for dismissal, and that a defense of arbitration is not properly raised in a Rule 12 motion. Plaintiff contends that a defense of arbitration does not clearly appear on the face of its pleading because none of the contracts attached to its complaint contain arbitration clauses; and the court, according to plaintiff, cannot consider the contracts attached to Swissair's motion to dismiss because plaintiff's claims are not based on those documents.

Plaintiff may be technically correct that rather than moving to dismiss pursuant to Rule 12(b)(1), Swissair should have moved to compel arbitration. But the Federal

Rules of Civil Procedure are meant to facilitate litigation, and the court will look past a misdesignation of a motion if doing so will not prejudice any party. Nothing except further delay would be gained here by requiring Swissair to refile what would, in essence, be the same motion except for its label. Other courts have converted a motion to dismiss into a motion to compel, see Interstate Securities Corp. v. Siegel, 676 F. Supp. 54, 55 (S.D.N.Y. 1988), and this court perceives no reason not to do so here. Therefore, Swissair's motion will be treated as a motion to compel arbitration. As such, the court may consider the extrinsic evidence offered by Swissair and is not limited to considering only those documents attached to plaintiff's complaint. See John Hancock Distributors, Inc. v. Saponaro, 901 F. Supp. 194, 196 (E.D. Pa. 1995) (noting that arbitrability issues involve factual inquiries which may require "'the introduction of extrinsic evidence"' (quoting Paine Webber v. Hofmann, 984 F.2d 1372, 1380 (3d Cir. 1990)).

Under the provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, the court must compel arbitration upon a showing that the issue involved is referable to arbitration pursuant to a written arbitration agreement. 9 U.S.C. § 4. Similarly, under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-08, a court must order arbitration if there is an agreement in writing to arbitrate the subject of the dispute, presuming some other qualifications are met as well. There is "a 'liberal federal policy favoring arbitration agreements.'" Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24-25 (1991) (quoting Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 2, 24 (1983)). The federal policy "in favor of arbitral dispute applies with special force in the field of international commerce." Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 726 (9th Cir. 1999). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration..." Moses H. Cone Memorial Hosp., 460 U.S. at 24-25.

The starting point for the court is to determine whether there is an agreement in writing requiring arbitration. See Republic of Nicaragua v. Standard Fruit Co., 937 F. 2d 469, 475 (9th Cir. 1991). Plaintiff argues that there is no written agreement between itself and Swissair to arbitrate the claims raised in plaintiff's action. As to the breach of contract claim, plaintiff contends that the contract that was breached was created by the series of letters between plaintiff, SR Technics, and Swissair regarding the extended warranties and the installation of IFEN Systems on four additional planes that are attached to plaintiff's complaint.[3] The letters do not contain an arbitration clause. Plaintiff argues that these letters constitute a separate and distinct contract from the October 29, 1997, sales contract between plaintiff and Swissair. Plaintiff offers two cases in support of its argument, International Ambassador Programs, Inc. v. Archexpo, 68 F.3d 337 (9th Cir. 1995), and an unpublished decision, Humetrix, Inc. v. Gemplus, S.C.A., No. 97-55080, 1997 WL 683301 (9th Cir. 1997), referenced in "Table of Decisions without Reported Opinions," 129 F.3d 125.

In Ambassador, the parties entered into two agreements relating to tours in Russia, one in April and one in July. The April agreement contained an arbitration clause; the July agreement did not. The court found the two agreements independent of each other because they concerned two separate types of tours and completely different groups of tourists. Ambassador, 68 F.3d at 340. In Humetrix, Gemplus U.S.A., a wholly-owned subsidiary of Gemplus, entered into an agency agreement with Humetrix. The agency agreement contained an arbitration clause. Gemplus then entered into sales and partnership agreements with Humetrix that did not contain arbitration clauses. The court found the agency agreement a separate and distinct contract from the sales and partnership

---

3. Exhibits B through H, attached to Complaint, Clerk's Docket No. 1.

agreements because the agreements were negotiated separately; one was a two-year marketing contract, while the other was a five-year sales, distribution, and promotion contract; and the parties to the agreements were different. Humetrix, 1997 WL 683301, at *2.

There are factual differences between the present case and the cases put forward by plaintiff. Unlike Ambassador, the two agreements here do not involve separate products; rather, both agreements involve the installation and service of IFEN Systems. The only difference in the two agreements are the planes in which the IFEN Systems will be installed. The present case is also distinguishable from Humetrix because the contracts are both sales and service contracts and involve the same parties.

The present case is factually closer to Hart Enterprises Int'l, Inc. v. Anhui Provincial Import & Export Corp., 888 F. Supp. 587 (S.D.N.Y. 1995), and Sandvik, Inc. v. Libby, 762 F. Supp. 596, 598 (S.D.N.Y. 1991), cases offered by the defendants. In Hart, Anhui and Hart entered into a series of contracts, all of which contained arbitration clauses setting arbitration in China. Disputes arose between the parties and they entered into a settlement agreement which structured future payments. Their settlement agreement did not contain an arbitration clause. When Hart failed to make the required payments under the settlement agreement, Anhui sought to begin arbitration of the dispute in China. Hart then filed suit against Anhui in the United States. Hart argued that the settlement agreement was a separate and distinct contract. The court did not agree because "[t]he claims relating to the settlement agreement, not to mention the settlement agreement itself, are inextricably interrelated to the sales contracts that contain the arbitration clause." Hart, 888 F. Supp. at 589. In Sandvik, Disston Inc., a wholly-owned subsidiary of Sandvik, sold a manufacturing plant to Disston Company. The parties entered into a sales

agreement that contained an arbitration clause. When Disston Company defaulted on its obligations under the sales agreement, the parties entered into two modification agreements, which did not contain arbitration clauses and which, Sandvik argued, were separate and distinct agreements. The court found that these agreements were instead a series of connected transactions. Sandvik, 762 F. Supp. at 598.

The present case is similar to both Hart and Sandvik in that the second agreement is interrelated to the first agreement. This is evidenced in the letters which plaintiff urges constitute the second agreement. In the letter that accepted plaintiff's offers to provide two years of additional warranty and to install IFEN Systems in three additional aircraft, Swissair indicated that the details of this acceptance "shall be outlined in an amendment to the existing Agreement and PSA."[4] As to equipping the fourth additional aircraft, Swissair indicated that it would accept an offer by plaintiff that met Swissair's terms, "in the shape of a contract amendment."[5] This also indicates that the second agreement was related to the first agreement. In fact, the second agreement was intended to be an amendment to the October 29, 1997, contract, and a proposed contract amendment was drawn up.

The proposed amendment was never signed by plaintiff or Swissair, but this does not conclusively establish that the letters are not an amendment to the first agreement. "The question of arbitrability ought to turn ... on whether the court can infer from the whole course of dealings between the parties that they intended the arbitration clause in their initial contract to govern disputes arising out of the alleged attempt to supersede that contract." Matterhorn, Inc. v. NCR Corp., 763 F.2d

---

4. Id., Exhibit F at 1.

5. Id., Exhibit H at 1.

866, 873 (7th Cir. 1985). Looking at the whole course of dealings between plaintiff and Swissair, it was obviously their intent that the second agreement be an amendment to the October 29, 1997, contract, not a separate and distinct contract.

The October 29, 1997, contract between Swissair and plaintiff contained the following arbitration clause:

> [e]xcept as otherwise agreed in writing by the parties, all disputes arising out of, in connection with or relating to this Agreement (including any subsequent amendment thereof), including any disputes regarding its execution, binding effect, termination or alleged breach, shall be resolved to the exclusion of the ordinary courts by an arbitration tribunal in accordance with the International Arbitration Rules of the Zurich Chamber of Commerce. ...The site of the arbitration shall be Zurich, Switzerland.[6]

By the express terms of this arbitration clause, the clause applies to any amendments to the contract. Therefore, the court finds that there is a written agreement to arbitrate here.

All claims "arising out of, in connection with or relating to" the October 29, 1997, contract are subject to the arbitration clause. There can be no dispute that plaintiff's breach of contract claim against Swissair is within the scope of this valid arbitration clause.

However, plaintiff argues that its promissory estoppel and breach of covenant of good faith and fair dealing claims are outside the scope of the arbitration clause in its contract with Swissair. Plaintiff urges that the

---

6. October 29, 1997, Contract at 26, ¶ 17.10, attached as Exhibit 2 to Karl Laasner Affidavit, Clerk's Docket No. 7.

promissory estoppel claim arises out of Swissair's promises to reactivate the IFEN Systems in the near future, and is not related to any obligations under prior contract. Similarly, plaintiff argues that the breach of covenant of good faith and fair dealing does not arise out of any obligations of the prior contracts between itself and Swissair. But plaintiff then contradicts itself and states that this claim arises out of the contracts attached to its complaint, just not the contracts attached to Swissair's motion to dismiss. Plaintiff ultimately argues that neither of these claims require an interpretation of the contract which Swissair claims is at issue here, the October 29, 1997, contract. Therefore, plaintiff argues, arbitration of these claims is not required and cites Dusold v. Porta-John Corp., 807 P. 2d 526, 530-31 (Ariz. Ct. App. 1990) (holding where tort claim does not require an interpretation of the underlying contract, no arbitration required), and Popper v. Monroe, 673 F.Supp. 1228, 1230 (S.D.N.Y. 1987) (holding that if defamatory statements have no material relationship to contractual relationship, no arbitration required).

The arbitration clause at issue here is very broad. It covers "all disputes arising out of, in connection with or relating to this Agreement."[7] Such a clause would be interpreted liberally. See Republic of Nicaragua, 937 F. 2d at 479; Simula, 175 F. 3d at 726. Plaintiff's claim for promissory estoppel alleges that "IFT [continued] to support plans and incur expenses for further scheduled installations and warranty work for the IFEN System."[8] This suggests that this claim relates to or arises out of the parties' contractual relationship, thereby making it subject to the arbitration clause. Similarly, plaintiff's complaint alleges that the breach of covenant of good faith and fair dealing claim arises out of "the special relationship" of the

---

7. Id., Contract at 26, ¶ 19.9.1.

8. Complaint at 8, ¶ 45, Clerk's Docket No. 1.

parties.[9] The relationship between the parties is the contractual relationship, and thus this claim would also relate to the parties' contract. Plaintiff's claims against Swissair take their essence from the contract between itself and Swissair. The court will not allow artful pleading to avoid a valid arbitration clause.

Because plaintiff's claims against Swissair are subject to the arbitration clause in the October 29, 1997, contract, the court is compelled to order arbitration. Section 3 of the Federal Arbitration Act provides that the court stay an action pending arbitration, but the Ninth Circuit as well as other circuits have recognized that it is within the court's discretion to dismiss an action if the arbitration clause is broad enough to bar all of the plaintiff's claims because it required the plaintiff to submit all its claims to arbitration. Sparling v. Hoffman Constr. Co., 864 F.2d 635, 638 (9th Cir. 1988); Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992). Because all of plaintiff's claims against Swissair must be submitted to arbitration, the court, in its discretion, dismisses plaintiff's complaint against Swissair.

Defendant SR Technics

SR Technics move to dismiss plaintiff's complaint on two grounds: (1) lack of subject matter jurisdiction, and (2) failure to state a claim upon which relief can be granted. Plaintiff does not dispute that a motion to dismiss pursuant to Rule 12(b)(6) is properly brought here, but plaintiff renews its argument that, properly, a Rule 12(b)(1) motion to dismiss should have been brought as a motion to compel arbitration. Again, the Rules of Civil Procedure are not so inflexible that mis-designation of a motion precludes the court from considering that motion. Parties

---

9. Id. at 9, ¶ 52.

are free to move in the alternative. Therefore, the court will treat SR Technics' motion as a motion to dismiss pursuant to Rule 12(b)(6) or, in the alternative, a motion to compel arbitration.

Dismissal for failure to state a claim is proper if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989) (quoting Gibson v. United States, 781 F. 2d 1334, 1337 (9th Cir. 1986), (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Plaintiff alleges that SR Technics breached the installation and warranty contracts by failing to pay plaintiff the sums due under that contract.[10] However, under no contract between SR Technics and plaintiff was SR Technics obligated to pay plaintiff any sum of money for the installation and warranty of IFEN Systems. Plaintiff attached a 1996 offer to its complaint and argues that this was a contract between itself, Swissair, and SR Technics.[11] In reality, plaintiff was not a party to this contract, even though it signed the contract. Plaintiff's representative was asked to sign the contract merely as an acknowledgment of plaintiff's obligation to pay SR Technics. Even if the 1996 offer were a contract between SR Technics and plaintiff, under that contract, there were no payments to flow from SR Technics to plaintiff.

SR Technics and plaintiff did enter into a contract dated November 3, 1997.[12] Under that contract, there were no payments to flow from SR Technics to plaintiff either. Plaintiff also alleged that SR Technics was somehow a party to the contract that plaintiff insisted was formed by

---

10. Complaint at 7, ¶ 41-42, Clerk's Docket No. 1.

11. Id., Exhibit A.

12. Attached as Exhibit 1 to Affidavit of Benjamin H. Sterchi, Clerk's Docket No. 7.

the series of letters attached to the complaint. Plaintiff's argument is based on the fact that some of the letters were sent to an SR Technics; employee. Even if the court had not found that these letters constituted an amendment to the October 29, 1997, contract between plaintiff and Swissair, the fact that the letters were addressed to SR Technics does not make SR Technics a party to this agreement. SR Technics appears to have been merely negotiating with plaintiff on behalf of Swissair. The actual acceptance of plaintiff's proposals were by Swissair alone. Because plaintiff and SR Technics had no contract that required SR Technics to pay plaintiff for the installation and warranty of IFEN systems, plaintiff has no basis for its breach of contract claim against SR Technics and that claim is dismissed pursuant to Rule 12(b)(6).

As to plaintiff's promissory estoppel and breach of covenant of good faith and fair dealing claims against SR Technics, these claims arose after November 3, 1997. It is possible that plaintiff may be able to prove some set of facts which would entitle it to relief since these claims are purportedly based on promises made by SR Technics about the reactivation of the IFEN systems. However, as with the like claims against Swissair, these claims against SR Technics are subject to an arbitration clause in the contract between SR Technics and plaintiff. The only contract between these two parties is the November 3, 1997, contract which contains an arbitration clause that is almost identical to that contained in the October 29, 1997, contract between plaintiff and Swissair. Therefore, for the same reasons that the court must compel arbitration of these claims against Swissair, the court must compel arbitration of these claims against SR Technics. Because all of plaintiff's remaining claims are subject to arbitration, the court, in its discretion, dismisses these claims rather than staying plaintiff's case against SR Technics pending arbitration.

CONCLUSION

SR Technics' and Swissair's motions to dismiss[13] are granted. The clerk of court shall enter judgment dismissing plaintiff's complaint without prejudice.

DATED at Anchorage, Alaska, this 31 day of March, 2000 .

/s/ H. RUSSEL HOLLAND
H. Russel Holland, Judge
District of Alaska

---

13. Clerk's Docket Nos. 5 and 11.

JUDGMENT ENTERED BY DISTRICT COURT
(April 3, 2000)

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Interactive Flight Technologies, Inc., Plaintiff, vs. Swissair Swiss Air Transport Company, LTD., SR Technics, and Sair Group, Defendants.	**JUDGMENT IN A CIVIL CASE** No. CV 99-0836 PHX HRH

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this Court having granted the Defendants Motions to Dismiss, that the Plaintiff take nothing. This complaint and action are hereby dismissed.

April 3, 2000
Date

RICHARD H. WEARE
District Court Executive/Clerk

/s/ R. GARRISON
(By) Deputy Clerk

cc: (all counsel)

DISTRICT COURT ORDER DENYING MOTION UNDER RULE 59 (May 31, 2000)

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

INTERACTIVE FLIGHT TECHNOLOGIES, INC., Plaintiff, vs. SWISSAIR SWISS AIR TRANSPORT COMPANY, LTD., SR. TECHNICS, LTD., and SAIR GROUP, Defendants.	No. CV 99-0836-PHX (HRH)

ORDER

Motion to Alter or Amend Judgment; and/or Motion for New Trial[1]

Pursuant to Rule 59(e), Federal Rules of Civil Procedure, plaintiff moves to alter or amend this court's

1. Clerk's Docket No. 29.

judgment of April 3, 2000.[2] Alternatively, plaintiff moves for a new trial pursuant to Rule 59(a). This motion is opposed.[3] Oral argument has not been requested.

Facts

Plaintiff is Interactive Flight Technologies, Inc. Defendants are Swissair Swiss Air Transport Company, Ltd., and SR Technics, Ltd. By order of March 31, 2000,[4] defendants' motions to dismiss were granted, and judgment was entered dismissing plaintiff's complaint without prejudice.[5] In granting the motions to dismiss, the court determined that the motions were in essence motions to compel arbitration and treated them as such. Plaintiff now moves to vacate the April 3, 2000, judgment pursuant to Rule 59(a) and (e).

Discussion

Rule 59(e) motions "should not be granted absent highly unusual circumstances." McDowell v. Calderon, 197 F.3d 1253, 1255 (9th Cir. 1999) (quoting, 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999)). Two circumstances under which a Rule 59(e) motion may be granted are if the court committed clear error and if manifest injustice would result if the judgment were not vacated. McDowell, 197 F.3d at 1255, n.1.

The sole issue here is whether Section 4 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, required the court to hold

---

2. Clerk's Docket No. 28.

3. Clerk's Docket No. 30.

4. Clerk's Docket No. 27.

5. Clerk's Docket No. 28.

an evidentiary hearing prior to granting defendants' motions to dismiss.

Section 4 of the Federal Arbitration Act provides, in pertinent part, that:

> [a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. ...The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. ...If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue.

9 U.S.C. § 4 (emphasis added).

Plaintiff contends that it was clear error for the court not to hold an evidentiary hearing once the court determined that it would treat the motions to dismiss as motions to compel arbitration. Plaintiff argues that Section 4 mandates that an evidentiary hearing be held if one party disputes the making of an agreement to arbitrate

and, had plaintiff been afforded that opportunity, it would have been able to present evidence that would have changed the outcome here.[6] Plaintiff also asserts that it was prejudiced by the court treating the motions to dismiss as motions to compel arbitration because plaintiff was not given a chance to challenge defendants' extrinsic evidence. Plaintiff claims it was entitled to notice that the court was going to treat the motions to dismiss as motions to compel arbitration. Plaintiff also argues that it was denied an opportunity to request the court to stay the action pending arbitration rather than dismiss the action. Plaintiff relies primarily on Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 (3d Cir. 1980), as support for its assertion that "the party who is contesting the making of the [arbitration] agreement has the right to have the issue presented to a jury."

Defendants contend that plaintiff had ample opportunity to challenge defendants' extrinsic evidence and that plaintiff was on notice that defendants believed plaintiff's claims were subject to arbitration. Defendants argue that the plaintiff's reliance on Par-Knit is misplaced, not only because it is a Third Circuit case, but also because other courts have criticized the opinion for failing to recognize the federal bias in favor of arbitration.

Defendants have the better argument here. Plaintiff's argument is basically that because it disputed there was a contract to arbitrate the underlying claims, it was entitled to an evidentiary hearing. Neither Section 4 of the Federal Arbitration Act nor Par-Knit stands for that proposition. Section 4 requires that the court "shall hear the parties". The court did hear the parties. The parties filed extensive briefing and an oral argument was heard on the motions

---

6. Much of plaintiff's initial briefing is devoted to outlining the evidence which plaintiff contends it would have presented at a hearing. The mere fact that this evidence may exist does not mean that plaintiff was entitled to an evidentiary hearing in the first instance.

to dismiss. Because the court was satisfied that the making of the agreement for arbitration was not in issue (9 U.S.C. § 4), it granted the motions to dismiss based on ample authority that it is proper to dismiss rather than stay an action if the arbitration clause is "'sufficiently broad to bar all of plaintiff's claims.'" Sparling v. Hoffman Construction Co., 864 F.2d 635, 637 (9th Cir. 1988) (quoting Martin Marietta Aluminum, Inc. v. General Elec. Co., 586 F.2d 143, 147-48 (9th Cir. 1978)).

The court in Par-Knit also recognized that the making of the arbitration agreement must be in issue before a party is entitled to jury determination. Although not cited by either party, there are cases which have considered this issue and have held that if there are no questions of fact concerning the agreement to arbitrate, the court need not hold an evidentiary hearing. See Commerce Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334, 340-41 (5th Cir. 1984); Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co., 706 F.2d 155, 158-59 (6th Cir. 1983).

Plaintiff had an opportunity to challenge defendants' evidence. It could have done so during the briefing and hearing on the motions to dismiss. That it chose not to do so does not now make the judgment manifestly unjust.

Conclusion

Plaintiff's motion to alter or amend judgment is denied.

DATED at Anchorage, Alaska, this 25 day of May, 2000.

/s/ H. RUSSEL HOLLAND
H. Russel Holland, Judge
District of Alaska